

Reforming the Fair Labor Standards Act: Recognizing On-Call Time as a Distinct Category of Compensable Work

By LOREN SCHWARTZ*

IN FEBRUARY 1982, Houston Northwest Medical Center (“Northwest”) gave Frederick Bright a promotion and a leash.¹ After working as a biomedical equipment repair technician for a little over a year, Bright was promoted to the position of senior biomedical equipment repair technician.² His new position required him to carry a pager during all off-duty hours and subjected him to the following three restrictions: (1) he was required to always be reachable by the pager; (2) he could not be “intoxicated or impaired to the degree that he could not work on medical equipment”; and (3) he had to always be in a position where he could be at the hospital within approximately twenty minutes of being paged.³

For eleven months straight, Frederick Bright was on-call.⁴ Not just on holidays and not just on the weekends, Frederick Bright was on-call twenty-four hours a day, seven days a week, for eleven months straight.⁵ Although he could go home after work, home was about as far as he could go.⁶ Along with his promotion, Frederick Bright was issued a twenty-minute electronic leash so that no matter what he was doing at a given time, he had to be able to leave at a moment’s notice and be close enough to the hospital that he could get there within twenty minutes.⁷ For eleven months, Bright could not so much as go

* I would like to thank my parents for all their years of care and support, Professor Maria Ontiveros for working with me on initial drafts of this Comment, and my editor, Jason Horst, for his hard work in bringing this Comment to publication.

1. *Bright v. Houston Nw. Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 673 (5th Cir. 1991).

2. *Id.*

3. *Id.*

4. *Id.* at 673, 679. Being on-call means that the employee is not actively working on his employer’s premises although he must be available to report to his employer if so requested. *See infra* Part I.A.

5. *Bright*, 934 F.2d at 673, 679.

6. *Id.* at 673.

7. *Id.*

out for dinner or to the movie theater without the very real possibility that he would have to leave whatever he was doing and immediately report to work.⁸

As Judge Jerre Williams of the Fifth Circuit later stated:

[Bright] was not far removed from a prisoner serving a sentence under slightly relaxed house arrest terms. He never could go to downtown Houston, he never could go to Galveston and see the ocean. He never could go to a baseball or football game in the Astrodome. An out of town event, even a visit to relatives or friends in San Antonio or Austin, was totally out of the question.⁹

After leaving the job in January 1983, Bright sued Northwest under the Fair Labor Standards Act ("FLSA" or "Act"),¹⁰ seeking overtime compensation for his on-call time.¹¹ The United States District Court for the Southern District of Texas granted Northwest's motion for summary judgment, holding that because Bright was not technically "working" during his on-call time, he was not entitled to any compensation.¹² On appeal, a divided panel of the Court of Appeals for the Fifth Circuit reversed and remanded for trial on the merits.¹³ On rehearing en banc, however, the Fifth Circuit affirmed the district court's decision.¹⁴ While acknowledging "the obvious truth that the long continued aspect of Bright's on-call status made his job highly undesirable and arguably somewhat oppressive," the court found it "obvious that the FLSA overtime provisions provide no relief for those oppressive and confining conditions."¹⁵

The problem with the *Bright* decision is not that it was wrongly decided, but rather that it was correctly decided. While the FLSA seeks to protect workers from being exploited by their employers, it is altogether impotent to address situations such as Bright's. Under the FLSA, someone is either working—in which case they must be paid a minimum wage—or they are not working—in which case no compensation is due.¹⁶ Because on-call time does not fit neatly into either of these two categories, any attempt to adjudicate on-call claims under the FLSA is akin to trying to force a square peg through a round hole.

8. *Id.* at 673, 679.

9. *Bright v. Houston Nw. Med. Ctr. Survivor, Inc.*, 888 F.2d 1059, 1064 (5th Cir. 1989).

10. 29 U.S.C. §§ 201–19 (2000).

11. *Bright*, 888 F.2d at 1060.

12. *Bright*, 934 F.2d at 674.

13. *Bright*, 888 F.2d at 1064.

14. *Bright*, 934 F.2d at 679.

15. *Id.* at 678–79.

16. *See* 29 U.S.C. § 206(a) (2000).

This Comment argues that the FLSA, as currently drafted, is incapable of justly addressing the issue of on-call time and that, as such, an amendment that expressly addresses the issue of on-call time is needed. More specifically, this Comment contends that statutorily separating on-call time from “regular” work time and setting a separate minimum wage and overtime premium for hours spent on-call are essential in order to eliminate the fallacious presumption by which on-call time must necessarily be characterized as either work or leisure. At the same time, such an amendment would stem the systematic exploitation of on-call employees and fulfill the FLSA’s goal of promoting fairness to workers.

Part I of this Comment examines the on-call relationship itself and explains why the FLSA, by its own terms, is ill-equipped to deal with the issue of on-call time. Part II details the difficulties that the lower courts have had in adjudicating on-call cases under the current framework. Part III explains why the FLSA ought to be amended and concludes with my proposal.

I. On-Call Arrangements Challenge the Traditional Boundaries Between Work and Leisure

A. The Emergence of On-Call Time as a Unique Employment Relationship

“On-call” time refers to time where an employee is not actively on duty but must nevertheless be available to report to his employer if so requested.¹⁷ Typically, an on-call employee will enjoy more personal freedom than an employee on active duty. For example, whereas an on-duty employee is generally required to remain on the employer’s premises or at an otherwise designated place of work,¹⁸ the on-call employee is more likely to be allowed to leave his place of employment.¹⁹ Furthermore, unlike the on-duty employee who may find himself under the continual supervision and/or direction of his employer, the on-call employee is given considerably more freedom to engage in activities of his choosing.

Despite the relative freedoms that on-call employees may enjoy, as the *Bright* case illustrates, such employees are far from free. By virtue of being on-call, an employee must structure his “free time” in

17. 1 MATTHEW BENDER, 3 CALIFORNIA EMPLOYMENT LAW § 3.07[e][i] (2004).

18. See 1 *id.* § 6.01.

19. See 1 *id.* § 3.07[e][1].

such a way that he can always be ready to report to work if needed.²⁰ Even where the employee is not actually called in, the fact that he *may* be called in will generally prevent him from engaging in a wide range of activities; anything that is either too far away from the worksite or that requires a solid block of time will generally be, as a practical matter, prohibited.²¹

Although the notion of on-call time is not new, technological developments in the last forty years have dramatically increased its feasibility. The influx of pagers in the 1970s and mobile phones in the 1980s made it significantly easier for employers to contact off-duty employees and call them into work.²² Meanwhile, increased global competition in the 1990s forced many domestic employers to re-evaluate the efficiency of their staffing arrangements.²³ Many employers began to recognize how an on-call staff could be used to efficiently accommodate workload fluctuations.²⁴ Particularly in industries where the demand for a product or service is subject to fluctuation with little or no notice, on-call arrangements allowed employers to pay employees for work done as the demand for such work arose.²⁵ Employers could thus ensure that their workloads were fulfilled without having to pay employees for periods of idleness.²⁶

Given the improved ability of employers to communicate with off-duty employees, along with the economic pressures to improve workforce efficiency,²⁷ on-call arrangements had attained significant popularity among employers in the 1990s.²⁸ Not coincidentally, more

20. See 1 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 501 (3d ed. 2005).

21. *Id.*

22. See Trends & Tangents, *Beepers by the Million*, FORBES, Apr. 15, 1997, at 8.

23. See U.S. DEP'T OF LABOR, TRENDS AND CHALLENGES FOR WORK IN THE 21ST CENTURY, <http://www.dol.gov/asp/programs/history/herman/reports/futurework/report/chapter6/main2.htm> (last visited Apr. 25, 2005).

24. See Christopher S. Miller et al., *On-Call Policies Help Avoid Overtime Pay*, HR MAGAZINE, July 1996, at 57, 57.

25. *Id.*

26. To illustrate, consider the hospital in *Bright*, which needed to ensure that its biomedical equipment could be fixed swiftly if the need arose. See *Bright v. Houston Nw. Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 672 (1991). By having *Bright* on-call, the hospital was able to ensure that its equipment would be fixed if needed without having to pay someone to be on the premises on a continual basis. *Id.*

27. See U.S. DEP'T OF LABOR, *supra* note 23.

28. See also Marisa DiNatale, *Characteristics of and Preferences for Alternative Work Arrangements*, 1999, MONTHLY LAB. REV., Mar. 2001, at 28, 31 (stating that by the 1990s there were at least two million employees in on-call relationships nationwide).

employees began seeking compensation for such time by filing suit under the FLSA.²⁹

B. The Fair Labor Standards Act Creates a Work/Leisure Paradigm Under Which On-Call Cases Must Be Adjudicated

In 1938, Congress enacted the Fair Labor Standards Act to correct the “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”³⁰ To this end, the FLSA created both “Minimum Wage” and “Maximum Hours” provisions. Under the “Minimum Wage” provision, covered employees³¹ must receive no less than a specified minimum wage for each hour worked.³² The “Maximum Hours” provision requires the payment of one and a half times the regular rate of pay for all hours worked in excess of forty per week.³³

While the FLSA thus establishes certain guidelines for compensating employees for their work, it neither defines the term “work” nor indicates when on-call time might be considered “work.” Because the Act is silent as to the treatment that is to be accorded on-call time, for purposes of the Act, such time is necessarily forced into either the “work” box or the “leisure” box. Such a paradigm ignores the possibility that perhaps on-call time does not belong in either box.

C. Current FLSA Work/Leisure Paradigm Necessarily Facilitates Inequitable On-Call Working Arrangements

Clifford Sharp, a noted scholar in the area of economics and time, has argued that to divide time into only two categories—work time and non-work time—is “an extremely crude and not very logical division.”³⁴ Nevertheless, the FLSA does precisely that.³⁵ Under the

29. See Eric Phillips, Note, *On-Call Time Under the Fair Labor Standards Act*, 95 MICH. L. REV. 2633, 2635 (1997) (“Only in the past decade have federal appellate courts examined whether particular on-call arrangements require compensation under the FLSA.”).

30. 29 U.S.C. § 202 (2000).

31. The FLSA covers approximately sixty percent of the workers in the United States. See Jon Tevlin, *Workplace Dilemma: Cash or Time Off?*, STAR-TRIB. (Minneapolis), May 5, 1997, at 1D. Among the largest groups of employees exempt from the FLSA are professional, administrative, and executive employees. See 29 U.S.C. § 213(a)(1) (2000).

32. 29 U.S.C. § 206(a) (setting the current minimum wage at \$5.15 per hour).

33. *Id.* § 207(a).

34. CLIFFORD SHARP, *THE ECONOMICS OF TIME* 122 (1981).

35. See 29 U.S.C. § 206(a) (requiring that “[e]very employer . . . pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for

FLSA, a line has been drawn where an employee is either working or not working.³⁶ While this division may be convenient, it is imprudently rigid and, by its very terms, unable to equitably account for the realities of on-call employment relationships.

During congressional hearings on the FLSA, the statute's chief advocate, President Franklin D. Roosevelt, spoke of ensuring that a person would receive a "fair day's pay for a fair day's work."³⁷ Indeed, a central motivation for enacting the FLSA was to ensure that people received compensation based, at least in part, on the value of their services.³⁸ Against this backdrop, this Comment submits that an equitable employment relationship is one in which an employee is compensated at a level that is roughly commensurate to the benefit that the employee provides to his employer per their employment agreement.³⁹

Under a strict dichotomy in which an employee's time is considered either fully-compensable work or non-compensable leisure time, the establishment of an equitable on-call employment relationship proves largely elusive. Whether the time is considered work or leisure, one party will receive an undeserved windfall.

Although not burdened to the extent of workers on active duty, on-call workers typically face significant restrictions on their liberty.⁴⁰ At the same time, their employers obtain a substantial benefit by being able to keep their workforces lean, knowing that if extra work arises, they may simply call on an off-duty, on-call employee.

As such, considering an on-call employee's efforts, classifying time as leisure, and thus non-compensable, fails to equitably account

commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce" a minimum wage).

36. *Id.*

37. 81 CONG. REC. 4983 (1937) (message from President Roosevelt to Congress).

38. See Phillips, *supra* note 29, at 2646 n.67 (stating that "advocates of the FLSA believed that basing the minimum wage in part on the value of service was critical to its viability").

39. This is not to suggest that every conceivable benefit that an employee confers upon his employer ought to be compensated. For example, where an employee acts outside the scope of his employment agreement and chooses to voluntarily act in a way that benefits his employer, compensation will ordinarily not be appropriate. To illustrate, consider an employee who goes to a dinner party and speaks highly of his employer to any guest who will listen. If the employee, of his own volition, does so simply because he is fond of his employer, there is no need for compensation. On the other hand, if part of the employee's job requirements is that he attend dinner parties and speak highly of his employer at these parties, then compensation would be appropriate.

40. See *supra* Part I.A (discussing how on-call duty may restrict an employee's personal freedom).

for the burdens imposed on the worker and the concomitant benefits that flow to the employer. In this situation, the employer receives the windfall in that he receives the benefit of having a worker on-call without having to tender any compensation for having received this benefit. Conversely, considering an employee's on-call time as work, and thus compensable at his regular rate of pay, may provide the employee with a windfall since, he will be compensated at the same rate as if he was actively working.

Theoretically, then, the work/leisure dichotomy threatens to unduly prejudice both the employer and the employee. However, given that on-call time does not conform to traditional conceptions of work, courts faced with the task of classifying on-call time as either work or leisure, have, for the most part, opted for the latter. Consequently, as a practical matter and as the following Part illustrates, the work/leisure dichotomy has operated primarily to the benefit of the employer—and to the detriment of their on-call employees.

II. Courts Struggle to Produce Equitable and Consistent Results Without Wandering Astray of the FLSA's Work/Leisure Paradigm

A. The Supreme Court's Framework for Addressing On-Call Compensation Preserves the Work/Leisure Paradigm

In 1944, the United States Supreme Court, for the first and only time, addressed the issue of time spent on-call in the companion cases of *Armour & Co. v. Wantock*⁴¹ and *Skidmore v. Swift*.⁴² Both cases involved firefighters who, in addition to their regular workweeks, were often required to remain on their employers' premises during off-duty hours to answer alarms.⁴³ In both cases, the plaintiffs sued under the FLSA to recover compensation for their off-duty hours spent on-call.⁴⁴

The Court in *Skidmore* stated that there was nothing in either the FLSA or in any case law to suggest that "waiting time" could not also be compensable "working time."⁴⁵ In *Armour*, the Court reinforced this principle when it stated that "[r]efraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be

41. 323 U.S. 126 (1944).

42. 323 U.S. 134 (1944).

43. *Armour*, 323 U.S. at 127; *Skidmore*, 323 U.S. at 135.

44. *Armour*, 323 U.S. at 127-28; *Skidmore*, 323 U.S. at 135.

45. *Skidmore*, 323 U.S. at 136.

hired, quite as much as service itself . . .”⁴⁶ Consequently, the Court held that, as a matter of law, time spent on-call could, under appropriate circumstances, be considered working time for which employees would have to be compensated.⁴⁷

According to the Court, the relevant inquiry should be whether an employee is “engaged to wait” or “waiting to be engaged”⁴⁸ or, similarly, whether the on-call time is spent predominantly for the benefit of the employer or the employee.⁴⁹ As the Court indicated, an employee whose on-call time is spent predominantly for his own benefit or who is “waiting to be engaged” is not entitled to compensation. Conversely, an employee whose on-call time is spent predominantly for the employer’s benefit and who is thus “engaged to wait” is entitled to compensation.⁵⁰ The Court directed lower courts to consider “all the circumstances of the case” in making their determinations.⁵¹

By requiring that the on-call time be classified as either fully compensable work time or non-compensable leisure time, the Supreme Court preserved the strict work/leisure paradigm that is inherent in the FLSA. Meanwhile, the Court provided little real guidance to lower courts faced with the task of adjudicating cases under this paradigm. While the Court directed lower courts to assess who received the “predominant benefit” of the on-call arrangement, it failed to offer any significant criteria for guiding this determination. Although semantically appealing, the “engaged to wait” versus “waiting to be engaged” distinction has offered little, if any, substantive value to the inquiry. Moreover, the Court’s statement that the outcome is to depend on “all the circumstances” has been similarly unhelpful.⁵²

B. The Work/Leisure Paradigm and the Supreme Court’s Failure to Provide Meaningful Guidance Under This Paradigm Leads to Inconsistent and Inequitable Results in the Lower Courts

1. Inconsistency in the Lower Courts

One of the primary practical difficulties that courts have had in adjudicating on-call claims lies in the fact that assessing who ultimately

46. *Armour*, 323 U.S. at 133.

47. *Id.* at 134.

48. *Skidmore*, 323 U.S. at 137.

49. *Armour*, 323 U.S. at 133.

50. *Id.*; *Skidmore*, 323 U.S. at 137.

51. *Armour*, 323 U.S. at 133.

52. *Id.*

received the predominant benefit of the time spent on-call entails a comparison of phenomena which, by nature, are difficult to compare. On the one hand, courts must consider the benefit that inures to the employer by way of having a workforce in reserve. On the other hand, they are to consider the benefit that the employee enjoys from having the freedom to be away from the worksite and engaged in activities that he might not otherwise be able to pursue. While assessing the benefit to the employer may, to a large extent, be examined by a quantitative analysis of labor expenditures saved, evaluating the extent to which an employee is able to enjoy his time on-call is purely qualitative. To compare the two then becomes somewhat like comparing apples and oranges.

Because the Supreme Court, in preserving the work/leisure paradigm, failed to provide any meaningful guidance for applying its "predominant benefit" test, lower courts have approached the issue of on-call time in a variety of ways. Some courts have approached the issue by making a generalized inquiry into the severity of the burdens placed on the on-call employees. Even amongst these courts, however, different circuits have frequently disagreed over the proper way to frame this inquiry. For example, the Eleventh Circuit has stated simply that a court will grant compensation if it determines that the employee's off-duty time is "severely restricted."⁵³ The Tenth Circuit, while maintaining the same type of general inquiry, takes a more liberal approach by awarding compensation where the on-call requirements have interfered (although not necessarily "severely") with the employees' personal pursuits.⁵⁴ Meanwhile, the Sixth Circuit asks whether the restrictions placed on the employee "are so onerous as to prevent employees from *effectively* using the time for personal pursuits."⁵⁵

53. *Birdwell v. City of Gadsden, Ala.*, 970 F.2d 802, 810 (11th Cir. 1992).

54. *See Armitage v. City of Emporia, Kan.*, 982 F.2d 430, 432 (10th Cir. 1992).

55. *Martin v. Ohio Tpk. Comm'n*, 968 F.2d 606, 611 (6th Cir. 1992). While such generalized approaches of the Sixth, Tenth, and Eleventh Circuits presumably represent an attempt to comply with the Supreme Court's command to consider "all the circumstances of the case," *Armour*, 323 U.S. at 133, practically speaking, these approaches frequently result in analyses which are overly conclusory. *See, e.g., Birdwell*, 970 F.2d at 810 (reaching a conclusion after only a cursory review of the evidence); *Spire v. Ben Hill County*, 745 F. Supp. 690, 702 (M.D. Ga. 1990) (same). In *Birdwell v. City of Gadsden, Alabama*, 970 F.2d 802 (11th Cir. 1992), a group of city-employed detectives sued their employer seeking compensation for their time spent on call. *Id.* at 807. The court, in seeking to apply the Supreme Court's "predominant benefit" test, held that an on-call employee's time had to be "severely restricted" in order to constitute compensable work. *Id.* at 810. After a cursory review of the evidence, the court summarily concluded that the detectives' on-call time

In contrast to these generalized approaches, other circuit have conducted more mechanical analyses in which the courts base their determination on a review of specific factors. The Ninth Circuit, for example, has identified eight factors that it uses to decide whether on-call time should be compensated. They are: (1) whether the employee is required to remain at the employer's worksite, (2) whether there are excessive geographical restrictions on the employee's movements, (3) whether the frequency of calls are unduly restrictive, (4) whether a fixed time limit for response is unduly restrictive, (5) whether the on-call employee can easily trade on-call responsibilities, (6) whether use of a pager or cellular phone could ease restrictions, (7) whether the employee has actually engaged in personal activities during call-in time, and (8) whether there exists an agreement between the parties as to compensation for on-call time.⁵⁶

Given the different approaches adopted by the different circuits, cases involving similar fact patterns have often produced opposite rulings.⁵⁷ In *Bright*, the Fifth Circuit approached the case by making a generalized inquiry into whether Mr. Bright could use his on-call time "effectively for his . . . own purposes."⁵⁸ After focusing much of its analysis on the geographical restrictions placed on Bright, the court concluded that despite the twenty-four hour on-call policy of his employer, he was not entitled to compensation for this time.⁵⁹

In *Cross v. Arkansas Forestry Commission*,⁶⁰ the Eighth Circuit was confronted with a twenty-four hour on-call policy much like the one in *Bright*.⁶¹ Similar to the Fifth Circuit, the Eighth Circuit framed the

"was not so restricted that it was not used predominately for their benefit" and that, as such, they were not entitled to any compensation for that time. *Id.*

56. *Owens v. ITT Rayonier, Inc.*, 971 F.2d 347, 351 (9th Cir. 1992). The first seven factors are explicitly mentioned as relevant to determining the extent to which an on-call employee is able to use his on-call time for personal purposes. *Id.* The eighth factor is mentioned separately as relevant in determining whether the time was spent predominantly for the benefit of the employer or the employee. *See also Cross v. Ark. Forestry Comm'n*, 938 F.2d 912, 916-17 (8th Cir. 1991) (emphasizing the following factors: (1) geographic restrictions placed on the employee; (2) the types of activities they could pursue; (3) the impact being on-call on their enjoyment of such activities; and (4) the duration of the on-call status).

57. *Compare Bright v. Houston Nw. Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 679 (5th Cir. 1991) (employee subject to twenty-four hour on-call policy with mandatory response time of approximately twenty minutes not entitled to compensation) *with Cross v. Ark. Forestry Comm'n*, 938 F.2d 912, 914, 918 (8th Cir. 1991) (employees subject to twenty-four hour on-call policy with mandatory thirty-minute response time entitled to compensation).

58. *Bright*, 934 F.2d at 673.

59. *Id.* at 679.

60. 938 F.2d 912 (8th Cir. 1991).

61. *Id.* at 914

issue in terms of whether the on-call policy restricted “the employee[s] from using the time for personal pursuits.”⁶² Although the Eighth Circuit expressed concern over the geographic limitations placed on the employees, this concern figured into only one of several factors that the court considered. Unlike the court in *Bright*, the Eighth Circuit expressed particular concern as to the types of activities the employees could pursue while on-call, the impact that being on-call had on their enjoyment of such activities, and the duration of the employees’ on-call status.⁶³ After considering each of these factors, the court concluded that, unlike the employee in *Bright*, the employees in *Cross* were entitled to compensation for their time spent on-call.⁶⁴

Thus, although the courts in *Bright* and *Cross* faced similar factual scenarios, the Supreme Court’s failure to articulate clearer standards for the adjudication of on-call cases under the work/leisure paradigm permitted the courts to engage in markedly different analyses. These differing analyses, in turn, led them to different results. Until lower courts receive more guidance in the adjudication of on-call cases, ideally in the form of an amendment abolishing the work/leisure framework, such inconsistencies will likely continue to persist.

2. Inequitable Results in the Lower Courts

Aside from the inconsistencies that have emerged under the current work/leisure framework, the Supreme Court’s directive that courts consider all the circumstances has permitted courts to consider a wide range of factors, many of which have almost universally militated against awarding compensation for time spent on-call. The use of these criteria has consequently perpetuated the type of inequitable results that the FLSA was designed to remedy.

Some courts, for example, in determining the compensability of an employee’s on-call time have considered whether the employee actually engaged in personal activities while on-call.⁶⁵ Such an inquiry,

62. *Id.* at 916.

63. *Id.* at 917–18.

64. *Id.* at 918.

65. *See, e.g.,* *Rousseau v. Teledyne Movable Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir. 1986) (pointing out that while on-call, the employees were “free to sleep, eat, watch television, watch VCR movies, play pingpong or cards, read, [and] listen to music”); *Bright*, 934 F.2d at 673 (indicating that *Bright*, while on call, “not only stayed at home and watched television and the like, but also engaged in other activities away from home, including his ‘normal shopping’ (including supermarket and mall shopping) and ‘occasionally’ going out to restaurants to eat”); *Brekke v. City of Blackduck*, 984 F. Supp. 1209, 1222

however, will often be irrelevant in assessing the burden actually imposed on the on-call worker. This is for two reasons. First, the inquiry is unduly limited in its scope. The *Bright* court, in ruling that the plaintiff's on-call time was non-compensable, pointed to the fact that Bright had been able to watch television during his on-call time, as well as engage in other activities away from home, including shopping for groceries and "occasionally" eating out.⁶⁶ The problem with this analysis is that it completely ignores everything that he could *not* do while on-call. The fact that he could watch television and shop for groceries does not change the fact that anything requiring a solid block of time was essentially prohibited.

Second, asking whether the employee actually engaged in personal activities ignores the fact that simply being on-call may produce a psychological burden that impairs the ability of on-call employees to enjoy such activities.⁶⁷ As one court pointed out in the context of an on-call requirement for firefighters: "The necessity to quickly respond to fire emergencies requires that the employees be physically and mentally capable of fighting a fire and therefore restricts their enjoyment of many recreational activities."⁶⁸ Research on the impact of on-call work has raised the prospect that the arrangements may increase an employee's stress and decrease his mental well-being.⁶⁹

In the *Bright* case, Bright testified that he was called into work, on average, about two times during the week and two to three times on the weekend.⁷⁰ Consider the situation in which, on a Thursday during a week in which Bright had not yet been called in, a family member asked him to go out to dinner. In such a situation, Bright would have had two options: stay at home, so as to not risk the disruption if he were called in, or go to dinner, aware of the very realistic possibility that he might have to leave at a moment's notice. For a court to then point to the fact that he was able to go to dinner ignores the fact that the quality of the outing was likely hampered by the anticipation of being called into work. While the burden of knowing that one may be

(D. Minn. 1997) (noting that the plaintiff, while on call "was able to socialize, attend church services, read, watch television, and participate in similar activities").

66. *Bright*, 934 F.2d at 673.

67. Studies have shown "that on-call work may play a role in increasing stress and decreasing mental well-being." Anne-Marie Nicol & Jackie S. Botterill, *On-Call Work and Health: A Review*, in 3 ENV. HEALTH J. art. 15, at 5, <http://www.ehjournal.net/content/pdf/1476-069x-3-15.pdf> (2004) (providing a summary of these studies and a more detailed look at the health effects of on-call work).

68. *Cross*, 938 F.2d at 917.

69. Nicol & Botterill, *supra* note 67, at 5.

70. *Bright*, 934 F.2d at 674.

called into work at any moment may not, by itself, warrant compensation at the level of an actively working employee, it nevertheless remains a very real dynamic of on-call relationships that should not be ignored.

In addition to making a blanket inquiry into whether an employee actually engaged in personal activities while on-call, many courts have considered the ability of the on-call employee to trade his on-call shift to a fellow employee.⁷¹ These courts reason that possessing such freedom lessens the burden placed on the employee.⁷² The problem with this argument is that the ability to trade on-call responsibilities does not in any way alter the nature of the time actually spent on-call.⁷³ One who can trade his on-call responsibilities, but chooses not to, still faces the same burdens of being on-call that he would have faced had he not had the option.

Finally, numerous courts have looked to employer-employee agreements to help determine whether the parties themselves considered the on-call time to be working time.⁷⁴ This inquiry is flawed, however, in that it presupposes that parties can contract around the

71. See, e.g., *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 936 (9th Cir. 2004); *Berry v. County of Sonoma*, 30 F.3d 1174, 1184–85 (9th Cir. 1994).

72. See, e.g., *Owens v. ITT Rayonier, Inc.* 971 F.2d 347, 351 (9th Cir. 1992) (finding the ability to trade on-call responsibility important in determining whether an employee could engage in personal pursuits); *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369, 373 (5th Cir. 1987) (finding that ability to trade on-call shift lessens burden on the employee by permitting the employee to leave the employer's premises).

73. See *Phillips*, *supra* note 29, at 2648 (quoting *Truslow v. Spotsylvania County Sheriff*, 783 F. Supp. 274, 278 (E.D. Va. 1992) (internal citation omitted)) ("The ability to trade shifts does not change the nature of the time spent while actually on call. How the employee came to perform the service should not matter: '[T]he crucial question [under the FLSA] is not whether the work was voluntary, but rather whether the [p]laintiff was in fact performing services for the benefit of the employer with the knowledge and approval of the employer.' An employee who accepts a normal shift of work must be compensated, even though he voluntarily accepted it and possibly could have traded it. On-call time should be treated no differently.")

74. See, e.g., *Owens*, 971 F.2d at 354 (indicating that an "important factor in determining if the on-call time was spent predominantly for the benefit of the employer is whether the policy was based on an agreement between the parties"); *Brock*, 826 F.2d at 374 (quoting *Allen v. Atl. Richfield Co.*, 724 F.2d 1131, 1136 (5th Cir. 1984)) (stating that "[t]he existence of such an agreement [is] a 'circumstance to consider in determining whether the off-duty time' is spent primarily for the employee's or employer's benefit"); *Rousseau v. Teledyne Movable Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir. 1986) (holding that the existence of an agreement is relevant to compensability); *Cleary v. ADM Milling Co.*, 827 F. Supp. 472, 476 (N.D. Ill. 1993) (finding the existence of an agreement to be an "important factor in determining whether on-call time is compensable").

requirements of the FLSA. With few exceptions not relevant here,⁷⁵ they plainly cannot.⁷⁶

The FLSA's "Minimum Wage" and "Overtime" provisions both contain language that clearly evinces an intention to preclude parties from contracting around its requirements.⁷⁷ The minimum wage provision provides that "[e]very employer *shall* pay to each of his employees" the required minimum wage.⁷⁸ Similarly, the overtime provision states that "[e]xcept as otherwise provided in this section, no employer *shall* employ any of his employees . . . for a workweek longer than forty hours unless such employee receives" the proper overtime premium.⁷⁹

Use of the term "shall" operates to make these provisions mandatory and demonstrates an intent to prohibit contracting around them.⁸⁰ Moreover, a major impetus for the FLSA was the recognition that employers and employees possessed significantly disparate bargaining power, which often allowed employers to subject employees to "labor conditions detrimental to the maintenance of the minimum standard of living."⁸¹ Thus, the minimum wage and overtime provisions were enacted to alter the freedom of contract that had previously existed. To enable employers to contract around these requirements would thus fly in the face of the plain language of the provisions. Moreover, doing so would flout Congress's recognition that the bargaining power between employer and employee needed to

75. See 29 U.S.C. § 207(b)(1)–(2) (2000) (exempting agreements made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board); *id.* § 207(b)(3) (exempting agreements involving employers engaged in the distribution of petroleum products).

76. See *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (internal citation omitted) ("FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.").

77. See 29 U.S.C. § 206(a) (2000) (minimum wage provision); 29 U.S.C. § 207(a) (2000) (overtime provision).

78. *Id.* § 206(a) (emphasis added).

79. *Id.* § 207(a)(1) (emphasis added).

80. See *W. Wis. Ry. Co. v. Foley*, 94 U.S. 100, 103 (1876) ("'Shall' ought undoubtedly to be construed as meaning 'must,' for the purpose of sustaining or enforcing an existing right."); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("The word 'shall' is ordinarily 'the language of command.'") (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)); see also *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 605 N.E.2d 368, 370 (1992) ("It is axiomatic that when it is used in a statute, the word 'shall' denotes that compliance with the commands of that statute is *mandatory*.").

81. See 29 U.S.C. § 202 (2000) (declaring that it is "the policy of this chapter . . . to correct and as rapidly as practicable to eliminate" those labor conditions detrimental to the maintenance of the minimum standard of living).

be narrowed in order to prevent unjust agreements as to wages and hours and to guarantee employees a minimum standard of living.

Allowing employers to induce employees into agreements stipulating that time spent on-call is not working time raises the same concerns as in the minimum wage and overtime context. In essence, an employer may exploit his advantage in bargaining power to define what does and what does not constitute compensable "work." Given that the FLSA prohibits employers from contracting around wage requirements for hours "worked,"⁸² it would be anomalous to allow the employer, in the alternative, the power to define "work." Depending on the extent of bargaining power disparity, the employer would be free to classify what is de facto work time as non-compensable on-call time. Given the language and purpose of the Act, such a situation should not be tolerated.

Recognition of employer-employee agreements in the area of on-call time may be particularly egregious where courts find implied agreements between the parties. Under such implied agreements, a court may recognize a constructive agreement between the parties provided merely that an employee, with knowledge of the working arrangement, continues to work at the job.⁸³

In *Rousseau v. Teledyne Movable Offshore, Inc.*,⁸⁴ for example, a group of barge workers were employed on a "hitch basis" by which they would spend seven full days working and living on the barges and then seven days off of the barges.⁸⁵ The arrangement also consisted of a "no leave" policy that required employees to remain on the barges during the entirety of their seven-day working hitch.⁸⁶ Thus, even when the employees were not engaged in actual physical labor, their employer required them to remain onboard the barges, yet paid them only for time spent in active labor.⁸⁷ This policy allowed the employer

82. See *supra* note 76 and accompanying text.

83. See, e.g., *Rousseau v. Teledyne Movable Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir. 1986); see also *Owens v. ITT Rayonier, Inc.*, 971 F.2d 347, 355 (9th Cir. 1992) ("[P]laintiff mechanics . . . may not have liked the company's formal call-in system, but by continuing to work, they constructively accepted the new terms."); *Gen. Elec. Co. v. Porter*, 208 F.2d 805, 813 (9th Cir. 1953) (holding that unilateral action of an employer was constructively accepted when employees, aware of the changes in their conditions of employment, continued to show up to work).

84. 805 F.2d 1245, 1248 (5th Cir. 1986).

85. See *Rousseau*, 805 F.2d at 1247.

86. See *id.*

87. See *id.* Where employees are required to remain on the employer's premises, some courts have referred to this as "waiting time" as opposed to "on call" time. See Elizabeth Feigin, Note, *Achieving Justice for On-Call Workers: Amending the Fair Labor Standards Act*, 84

to delegate any jobs that came up on short notice to an on-call employee without having to pay the employee to wait around for such jobs to arise.⁸⁸

Rather than focus on the burdens placed on the employees by refusing to let them leave the premises or the benefit that the employer enjoyed by being allowed to exert control over these employees, the court found that by continuing to work for the company with knowledge of the conditions, the employees constructively agreed to be bound by such conditions.⁸⁹ In subsequently denying compensation to the on-call workers, the court plainly ignored both the burdens placed on the on-call employees and the attendant benefits enjoyed by the employer.

Normally, where an employer compels an employee to act in a way that burdens the employee while benefiting itself, equity would seem to dictate compensation for the employee. Nevertheless, as long as lower courts remain free to consider "all the circumstances" unaccompanied by any meaningful guidance from Congress or the Supreme Court, they will be permitted to adopt criteria that, intentionally or not, operate to systematically deprive on-call workers of compensation. Thus, until there is a departure from the current framework, employees will continue to be subjected to burdensome on-call arrangements without any compensation to show for it.

C. Lower Courts Are Forced Outside the FLSA to Reach Equitable Outcomes

While most employment arrangements have clearly demarcated boundaries between work time and leisure time, time spent on-call has challenged these boundaries. Despite the FLSA's rigid dichotomy by which employees are either working or not working, employers and courts alike have recognized that on-call time frequently merits a form of compensation distinct from that currently provided under the statute.

For example, many employers pay employees a base rate for hours worked plus an additional—typically lesser—amount for hours

IOWA L. REV. 351, 356 n.30 (1999). Nevertheless, waiting time and on-call time are functionally the same in terms of determining whether the employee is owed compensation under the FLSA. *See id.* "Essentially waiting time is on-call time spent at the workplace." *Id.*

88. *See Rousseau*, 805 F.2d at 1249.

89. *See id.* at 1248.

spent on-call.⁹⁰ In *Spencer v. Hyde County*,⁹¹ the employer, Hyde County, paid the plaintiffs (emergency medical technicians) an annual salary, and additionally, paid them \$2 per hour for every hour spent on-call. During their on-call time, the employees were required to carry a two-way radio and were expected to respond to emergency calls within five minutes.⁹² Although the employees could and often did engage in a variety of recreational activities during their on-call time, they were generally unable to tend to such personal activities as grocery shopping, going to a movie, having their car repaired, or visiting a doctor.⁹³

The employer seemed to recognize that while not equivalent to time spent on active duty, the employees' on-call time did subject them to certain restrictions and burdens. As such, the \$2 per hour presumably represented compensation commensurate with the relative burden placed on the employees.⁹⁴ While such an arrangement could be commended for recognizing the relative burdens placed on on-call employees, because the \$2 rate falls below the minimum wage, it is simply untenable under the current law. Where an employer pays a rate below the minimum wage for services rendered, the employer has violated the FLSA, regardless of whether this rate is actually commensurate with the burden experienced by the employee.⁹⁵

With that said, courts have recognized the inequities of not compensating employees at all for time spent on-call and have stretched the parameters of the Act in order to reach equitable outcomes. In *Brown v. Allen Parish Police Jury*,⁹⁶ plaintiff Hazel Brown was hired on as Allen Parish Airport's caretaker.⁹⁷ Mrs. Brown's duties included providing fuel to incoming and outgoing planes, clearing the runway of debris, notifying her employer to cut the grass around the airstrip, patrolling the hangars for trespassers, and keeping a general watch over the airport.⁹⁸ Furthermore, because the arrival and departure of

90. See Nicol & Botteril, *supra* note 67, at 2 (indicating that "generally, but not always, employees are compensated monetarily for the period of [time which they are on] call, usually with a stipend which is less than their hourly rate").

91. 959 F. Supp. 721 (E.D.N.C. 1997).

92. See *id.* at 722.

93. See *id.* at 723.

94. The court in *Spencer*, after finding that there were material facts still in dispute, denied the defendant's motion for summary judgment. *Spencer*, 959 F. Supp. at 727.

95. See 29 U.S.C. § 206(a) (2000) (requiring that employers pay to each of his employees the minimum wage).

96. 526 So. 2d 1190 (La. Ct. App. 1988).

97. *Id.* at 1191.

98. See *id.*

planes was generally unpredictable, she "was required to be on the premises continually twenty-four hours a day, seven days a week, including holidays."⁹⁹ For her work, Mrs. Brown received monthly wages of \$75, living quarters valued at between \$60 and \$120 per month, and utilities of \$40 per month.¹⁰⁰

After suing under the FLSA for past due minimum wages and overtime compensation, the court held that, in light of the twenty-four hour job requirement, the compensation provided was inadequate.¹⁰¹ The court remanded the case to the district court for a determination of actual hours worked.¹⁰² It instructed the lower court that Brown must receive the minimum wage for time actually worked, along with the FLSA overtime premium for all hours worked over forty in any given week.¹⁰³ Moreover, the court sought to compensate Brown for the additional burdens placed on her as a result of continually being on-call.¹⁰⁴ As the court indicated:

[W]e feel that Mrs. Brown's compensation should include an additional amount that takes into account the restrictions on her personal freedom caused by the 24-hour job requirement. Hence, we feel that an additional amount of 15% of her estimated actual weekly work time would adequately compensate Mrs. Brown for any inconvenience she experienced.¹⁰⁵

As Hyde County did in *Spencer*, the court in *Brown* recognized that, while not equivalent to active duty, time spent on-call places burdens of its own on employees that, in certain circumstances, ought to merit compensation.¹⁰⁶ The problem with the remedy in *Brown* is that it has no basis in the FLSA. While a plaintiff may be entitled to liquidated damages and/or attorney's fees in FLSA cases, the extra 15% represented neither of these. Instead, the court based this valuation upon the burden imposed on Brown as a result of being continually on-call.¹⁰⁷ While *Brown* represents a laudable attempt to compensate employees for their time on-call, it is nevertheless apparent that the court was forced to go outside the bounds of the FLSA to do so.

Taken together, *Spencer* and *Brown* represent an acknowledgment of the fact that time spent on-call subjects employees to certain restric-

99. *Id.*

100. *See id.* at 1193.

101. *See id.*

102. *See id.* at 1194.

103. *See id.*

104. *Id.*

105. *See id.*

106. *Id.*

107. *Id.*

tions and burdens that will often warrant some form of compensation. The fact that the employer in *Spencer* and the court in *Brown* had to go outside the parameters of the FLSA is noteworthy and indicative of the fact that the FLSA's strict work/leisure paradigm, as currently drafted, is unable to equitably address the issue of time spent on-call.

III. The Courts' Inability to Produce Equitable and Consistent Results Under the Current Framework Confirms That an Amendment Is Needed

A. An Amendment Is Needed to Rectify the Inequities and Inconsistencies That Characterize Current On-Call Jurisprudence

The presumption that on-call time must necessarily be either "work" or "not work" has spawned a nebulous body of law in which on-call workers are routinely denied compensation despite the significant burdens that they are forced to bear by their employers.¹⁰⁸ Much of the current legal scholarship regarding on-call time has criticized the manner in which courts have applied the *Armour-Skidmore* framework and has suggested that courts modify their analyses under this framework in order to produce more equitable results.¹⁰⁹ Some commentators have offered well-reasoned suggestions for altering the Court's doctrinal approach, which, if adopted, would appear to promote fairer results for on-call workers.¹¹⁰ However, to the extent that such proposals accept the presumption that on-call time may properly be classified as either "work" or "not work," they address only the problem's symptoms and not its root.

As Part II demonstrated, attempts to classify on-call time as either "work" or "not work" represent a legal fiction that sixty years of misguided jurisprudence have proven untenable.¹¹¹ Because on-call time typically does not fit into the conventional notion of "work," and because time spent on-call can rarely be equated with time spent on active duty, courts have generally been compelled to deny compensation

108. See *supra* Parts III.B–C. (discussing the problems that courts have had adjudicating on-call cases under the *Armour-Skidmore* framework).

109. See, e.g., Phillips, *supra* note 29, at 2644–47 (arguing that courts ought to place more emphasis on the extent to which on-call time benefits the employer); Feigin, *supra* note 87, at 370 (recommending that employer-employee agreements regarding the compensability of on-call time be eliminated from courts' analyses).

110. See, e.g., Phillips, *supra* note 29, at 2644–47; Feigin, *supra* note 87, at 370.

111. See *supra* Parts II.B–C (discussing the problems that courts have had adjudicating on-call cases under the *Armour-Skidmore* framework).

to on-call workers even where the patent unfairness of such non-compensation is explicitly recognized.¹¹² Absent an amendment in which on-call time is recognized as a distinctive work arrangement, which in and of itself, merits compensation, courts will continue to be hamstrung in their abilities to equitably adjudicate on-call cases, and employees will continue to be subjected to burdensome on-call shifts without compensation.

Moreover, unless and until the FLSA is amended, lower courts will continue to be bound by the Supreme Court's acceptance of a pure work/leisure paradigm. Given the Supreme Court's admonition to "consider all the circumstances"¹¹³ under this paradigm, absent an amendment, courts will continue to have broad discretion to approach on-call cases as they see fit, provided only that these approaches conform with the broad contours of the *Armour-Skidmore* framework. Because this framework is so vague, however, courts will inevitably continue to approach on-call cases in a variety of ways, and, as a result, the current inter-circuit inconsistencies will be permitted to endure.

Consequently, unless a departure is made from the current framework, both the inconsistencies and inequities that characterize current on-call jurisprudence will likely continue to exist.

B. The Proposal

At the end of the opinion in *Bright*, the court acknowledged "the obvious truth that the long continued aspect of Bright's on-call status made his job highly undesirable and arguably somewhat oppressive."¹¹⁴ Then, in a statement that should have alarmed lawmakers, the court stated that it was also "obvious that the FLSA . . . provide[s] no relief for those oppressive and confining conditions."¹¹⁵

This Comment argues that the FLSA should provide relief for such conditions through an amendment to the FLSA, explicitly acknowledging on-call time as a distinct category of compensable work. Such an amendment would eliminate much of the confusion and uncertainty that have dominated on-call jurisprudence for so many years.

112. See *Bright v. Houston Nw. Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 678-79 (5th Cir. 1991) (acknowledging that despite the fact that "the long continued aspect of Bright's on-call status made his job highly undesirable and arguably somewhat oppressive . . ." it was "obvious that the FLSA . . . provide[s] no relief for those oppressive and confining conditions").

113. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

114. *Bright*, 934 F.2d at 678.

115. *Id.* at 678-79.

At the same time, it would clear the dockets of cases brought by aggrieved employees faced with the often Sisyphean task of demonstrating that their on-call time was in fact work time.

The proposed amendment is not intended to be hostile toward the notion of on-call time, since properly implemented, on-call arrangements may provide mutual benefits to both employer and employee. For employers, on-call time arrangements enable them to more efficiently accommodate fluctuating workloads. The amendment, then, would simply ensure that the on-call employee is compensated for providing this benefit.

To this end, the amendment would first create a minimum wage—somewhat lower than the “regular” minimum wage—for all hours spent on-call. Compensating employees for such time spent recognizes that on-call time places significant burdens on the employee and creates a very real benefit for the employer—a benefit that should not be received for free. At the same time, by creating an “on-call minimum wage” lower than the “regular” minimum wage, the amendment recognizes that, typically, the relevant burdens and benefits at issue in the on-call arrangement are not as great as where an employee is actively working for the employer.

In addition to the minimum wage provision, the amendment would also create an overtime premium in which workers who are on-call for more than a certain number of hours per week would be entitled to increased compensation for those hours.¹¹⁶

While on-call time arrangements may be advantageous to both parties in limited doses, situations that require an employee to remain on-call for repeated long periods of time are more likely to be particularly deleterious to the employee’s mental health.¹¹⁷ Although employers should not be expected to act as guardians of their employees’ well-being, the FLSA provides Congress with a clear mandate for discouraging work arrangements that adversely affect their employees’ health.¹¹⁸ By providing for an overtime premium exclusively applicable to on-call time, the amendment would seek to ensure that the fre-

116. This premium would resemble the current overtime premium in which employees are compensated 1.5 times their base pay rate for every hour worked over forty each week. 29 U.S.C. § 207(a) (2000). However, the precise details of the overtime compensation structure for on-call time are beyond the scope of this Comment.

117. See Nicol & Botterill, *supra* note 67. (concluding that the more time people spend on call, the more prone they are to stress, anxiety, and depression).

118. See 29 U.S.C. § 202(b). The FLSA was designed to correct and eliminate the “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” 29 U.S.C. § 202(a).

quency of such arrangements is minimized and, in the alternative, that workers who are subject to such arrangements are compensated at a higher rate in recognition of the additional burdens being imposed on them.

Conclusion

When the FLSA was enacted in 1938, it altered the freedom of contract that had traditionally existed in employment relationships.¹¹⁹ By enacting the minimum wage and overtime provisions, Congress recognized that where market forces were allowed to operate unchecked, employers were routinely able to utilize their superior bargaining position to subject employees to substandard working conditions.¹²⁰

Because the FLSA does not account for on-call time, employers have had wide latitude to inject it as a condition of employment. While the FLSA seeks to protect workers through the minimum wage and overtime provisions, on-call time has essentially become a loophole in the system that the FLSA does not adequately address. Although some courts have sought to compensate employees for their time spent on-call, the tide has been strongly one of non-compensation.¹²¹ As a result, the same type of worker exploitation that prompted passage of the FLSA in the first place continues to exist in the form of on-call time.

For over half a century, courts have struggled to honor the FLSA's goal of promoting fairness to workers while attempting to determine when on-call time might properly be classified as compensable "work." This Comment has argued that on-call time is neither "work" in the traditional sense, nor is it time truly belonging to the employee but is rather a unique employment arrangement which is deserving of separate treatment.

As long as courts continue to accept the errant presumption that on-call time must necessarily be classified as either "work" or "leisure," the inconsistencies and inequities that are the hallmarks of on-call ju-

119. See Feigin, *supra* note 87, at 371 (stating that "[t]he FLSA was designed to alter the freedom to contract between employers and employees").

120. See 29 U.S.C. § 202(a) (noting the presence of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers").

121. See *Brekke v. City of Blackduck*, 984 F. Supp. 1209, 1222 (D. Minn. 1997) (noting that "in the vast majority of reported cases dealing with on-call time, the hours were held noncompensable under the FLSA").

risprudence will inevitably endure. For too long, employers have been able to use on-call time to create oppressive working arrangements. The proposed amendment to the FLSA should help the Act live up to its name—the *Fair* Labor Standards Act.

